IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO. 7454 OF 2006

Deeparam Bhati & ors .... Petitioner

versus

Pimpri Chinchwad Mun. Corpn..... Respondent.

Shri Ashok C. Bhatewara for the petitioner
Shri N.V.Walawalkar i/b G.H.Keluskar for respondent.

CORAM; A.P. DESHPANDE, J.
DATED; 28TH AUGUST, 2007

P.C.;

1. The respondent Corporation issued a notice to the present petitioners, who are adjoining shop owners under section 264 of the BPMC Act directing the petitioners to demolish the structure mentioned in the notice, as the structure was in a dangerous condition. The notice was issued by the building engineer asking the petitioners to pull down the structure within one day. As there was hardly any time to the petitioner to approach the Corporation, they chose to file a Civil Suit in the Court of CJJD for declaration and injunction. In the said suit an application for temporary injunction was filed seeking to restrain the respondent from acting on the notice of demolision dated 12-6-2006. Before the trial court, the present

petitioners have submitted that the shops in question were earlier admeasuring 65 ft. x 11 ft. However, the petitioner removed portion of the suit property in the year 1998 and in the year 2006 which left the remaining structure only to the extent of 16 ft. x 11 ft. According to the petitioners as the Corporation was intending to widening the road, they had themselves removed this structure, which was required by the Corporation for road widening. The trial court found that the structure which has been directed to be pulled down, being dangerous to the public at large, has been erected without prior permission of the Corporation. Rather it is the case of the present petitioners that after removal of the structure on two occasions, once in 1998 and the next in 2006, the petitioner has re-erected or repaired the strucfture. It does appear that the suit structure has been erected without any permission from the respondent. As the trial court held that the petitioners have failed to establish primafacie good case, the application for temporaqry injunction came to be rejected. The appeal court as well concurring withthe view taken by the trial court has concluded that the petitioners have failed to make out a primfacie good case.

2. The learned counsel for the petitioner has in the

first place, contended that the discretion to be exercised by the Commissioner has to be a bonafide act which is just and reasonable and it cannot be arbitrarily and unfair. The learned counsel has submitted that the malafides are pleaded in the plaint. According to the petitioner, what is contended in the plaint is that a huge structure has come up on the rear side of the shops of the present petitioners and the owner of the said structure is instrumental in causing issuance of notices to the present petitioner. The Corporation is said to have acted at the behest of the owner of the said property, and has issued the notice malafidely. Malafides are easy to allege and difficult to establish. Perusal of the orders passed by the courts below clearly reveal that the submission in regard to the action being malafide was not canvassed. Though the learned counsel for the petitioner has submitted during the course of argument that the grounds of malafide was pressed in service, the petitioner has failed to demonstrate the same. Had the petitioner urged the grounds of malafides, the courts below would have dealt with the same and at any rate, if the courts did not deal with the same, the petitioner would have raised the grounds in the writ petition that malafides were pressed in service but not considered by the courts below. There is no such ground taken in the

writ petition, about the grounds of malafides being urged before the courts below and failure on their part to consider the same. Thus in the writ petition for the first time, the petitioner cannot be permitted to urge that the action on the part of the respondent in issuing notice under section 264 of the Act is malafide.

3. The learned counsel then tried to submit that the petitioners did try to substantiate the petitioner's claim that the condition of the structure is good and it does not require demolosion, by producing certificate issued by the architect. The first appellate court has considered the said piece of evidence and rejected it. The first appellate court has observed that neither the certificate issued by the architect nor the plaint reveals the particulars of inspection. No reasons are stated in the said certificate. Though the case of the petitioner is that their construction is RCC structure but there is no mention of the same in the certificate. Both the courts below have considered the material in the form of certificate issued by architect and while primafacie considering the same, has rejected it. Having regard to the totality of the facts and circumstances, I do not find any patent illegality committed by the Courts below warranting any

interference in exercise of writ jurisdiction. Petition challenging interlocutory order thus must fail.

4. The learned counsel for the petitioner has placed reliance on a reported judgment of **10 Bombay Law Reporter page 821** to contend that the discretion vested in the Commissioner is capable of being judicially reviewed. The said judgment lays down that the power vested with the Commissioner though wide, need to be exercised justly and fairly and cannot be exercised arbitrarily. The said judgment does not advance the case of the petitioner any further. The next judgment relied upon is the judgment of the Division Bench reported in **(2006) 5 All.M.R. 153.** The Division Bench was dealing with the similar provision, which finds place in section 289 of the City of Nagpur Corporation Act. The court has held, the authority issuing notice of demolition must be satisfied on the basis of material that such action of demolision is essential. In the facts of the said case, the court found that the power was exercised arbitrarily and thus interfered with the same. The facts in the judgment referred to hereinabove are not similar to the facts in the present writ petiiton. The ratio laid down in the said judgment is not

applicable to the facts of the present case.

5. The Writ Petition is thus summarily dismissed. During pendency of the petition, the respondent had given an undertaking, not to demolish the petitioner's property till the petition is heard. Now that the petition is heard and disposed of. Needless to mention that the respondent stands relieved from the said undertaking.

6. At this stage, the learned counsel for the petitioner submits that the trial court would be influenced by the observations made in this order while deciding the suit on merit. The apprehension is ill-founded in as much as the observations made in this order are primafacie in nature and would in no way influence the trial court while deciding the suit on merit.

7. At this stage the learned counsel for the petitioner prays for grant of stay of this order for a period of two months. The prayer is rejected.

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